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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-204

THOMAS B. DELASHAW, III,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,

Respondent.

HOUSTON GENERAL INSURANCE COMPANY, etc., *et al.*,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

The court below considered each question to which the privilege against self-incrimination was claimed, and ruled separately on the various questions that Petitioner had either failed to make a sufficient showing that the privilege attached, or that there was no privilege, or that Petitioner had waived his right to claim the privilege.

The questions presented for review by Petitioner in his petition are based solely upon supposition and do not reasonably relate to the rulings made by the Superior Court. Contrary to Petitioner's contentions, the court below did not rule that the privilege against self-incrimination was not available in a pre-trial civil discovery proceeding; nor did the court hold that Peti-

tioner waived his privilege by testifying to unrelated, non-incriminatory information.

The questions which were presented to the Superior Court were simply:

1. Did Petitioner make a sufficient showing that the privilege against self-incrimination was applicable, that is, that the information sought might possibly tend to incriminate him; and

2. If applicable, did Petitioner waive the privilege by testifying to other, closely related facts?

Respondent submits that the lower court's resolution of these factual questions, which resulted in a rejection of the claim of privilege by Petitioner, was in accordance with applicable decisions of this court.

Statement of the Case.

The subject lawsuit was commenced by one Home Savings and Loan Association (herein "HOME") to recover the principal sum of $300,000.00 from Respondent Houston General Insurance Company (herein "HOUSTON") by reason of a financial guaranty bond allegedly issued by Houston, as surety, on behalf of one Marina West Insurance, Inc. (herein "MARINA WEST"). Said bond was given to Home as security for payment of a portion of the purchase price of certain improved real property known as the "Lido Apartments" sold by Home to Marina West. Marina West later defaulted in the payment of the purchase price and the subject lawsuit followed.

Petitioner, as an officer of Marina West, is believed to be the person who participated in said real estate transaction and in the procurement of said bond on behalf of Marina West.

In answer to the Complaint, Houston asserted, as alternative defenses, the possibilities that the bond was a forgery, or that it was procured by fraud with the knowledge of Home, or that Home failed to disclose to Houston certain facts concerning the real property transaction which would affect the risk undertaken by the surety.

Houston also filed a Cross-Complaint against Petitioner and others for indemnification in the event Houston is found to be liable to Home. A money judgment is sought from Petitioner on the alternate grounds that he was an *alter ego* of Marina West, the principal on said bond, or that he had participated in the alleged fraudulent procurement of said bond.

As part of its pre-trial discovery in the subject civil action, Houston took the deposition of Petitioner to ascertain information concerning said real estate transaction and the circumstances under which said financial guaranty bond was issued. During his deposition, Petitioner refused to answer any questions concerning the subject matter of said real estate transaction or said bond procurement, basing his refusal to answer some 190 questions on the ground of the Fifth Amendment privilege against self-incrimination.

Due to its inability to obtain answers from Petitioner to any questions concerning the subject matter of the pending lawsuit, Houston is gravely handicapped and prejudiced in its preparation of a defense to the subject action, which requires information concerning the circumstances under which the financial guaranty bond was procured and information concerning the negotiations and dealings between Petitioner and others with Home on the real estate transaction. Accordingly, Hous-

ton brought a motion to compel answers to its deposition questions, contending that Petitioner failed to sufficiently establish that the Fifth Amendment privilege applied, or, if it did, that Petitioner had waived the privilege.

The Honorable August J. Goebel, Judge of Respondent Superior Court of the State of California, after reviewing the deposition and considering the legal briefs submitted in favor of and against said motion, ordered Petitioner to answer the questions propounded to him at the deposition, ruling on varying questions that Petitioner had either failed to establish that the privilege was applicable or that the privilege was waived.

Thereafter, Petitioner filed with the Court of Appeal, Second Appellate District, State of California, an Application for Stay and Petition for Alternative Writ of Mandate and/or Prohibition and/or Certiorari for the purpose of nullifying the lower court's order, contending that said court had violated Petitioner's privilege against self-incrimination as afforded by the Fifth Amendment of the United States Constitution.

The Court of Appeal summarily denied said petition for extraordinary relief on April 8, 1975. A subsequent petition for hearing in the California Supreme Court was summarily denied on May 8, 1975.

ARGUMENT.

On the majority of the questions presented below, the Superior Court ruled that Petitioner did not sustain his burden of showing that the privilege attached, *i.e.*, that his testimony might have tended to incriminate him.

Whenever a claim of privilege against self-incrimination is asserted, it is well settled that the court must determine whether or not the answer to a particular question would subject the witness to a danger of incrimination. The mere assertion of the privilege does not of itself automatically establish the hazard of incrimination. *Rogers v. United States,* 340 U.S. 367 (1950); *Overend v. Superior Court,* 131 Cal. 280 (1900). Furthermore, the witness has the burden of showing that the information sought might tend to incriminate him. Section 404, *California Evidence Code.*

In making its determination of whether or not the answer called for by a question could form a necessary link in a chain of evidence leading to conviction of a crime, the court must consider all of the surrounding circumstances, including the setting in which the questions were asked. *Overend v. Superior Court, supra; Cohen v. Superior Court,* 173 Cal.App.2d 61 (1959).

In the light of the foregoing established authority and the circumstances present in the subject action, Houston submits that the lower court properly ruled that the privilege did not attach in this case, for the following reasons:

1. The questions asked do not, on their face, seek answers which would be incriminating *per se.*

2. The setting in which the questions were asked is unlike *Hoffman v. United States,* 341 U.S. 479 and

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related cases where the proceedings involved legislative crime investigations or grand jury hearings. This is a private, civil proceeding whereby Houston seeks to recover indemnification from Petitioner and others by way of money damages, and the deposition sought information to enable Houston to prepare and prove its civil case. The object of the deposition proceeding was not to charge nor accuse Petitioner with the commission of a crime, if any existed.

3. The only showing whatsoever made on behalf of the Petitioner concerning the alleged incriminatory nature of the deposition inquiry was by Petitioner's present counsel, Mr. Francis, who stated that he was aware of criminal investigations against Petitioner at that time or that had been conducted by agencies such as the FBI, the IRS and the Los Angeles County District Attorney's office that *can* or do have reference to the transactions involved in this action. Yet, Petitioner testified that he had never communicated with representatives of the IRS nor the Los Angeles District Attorney's office and, when questioned about whether he discussed the matters involved in the subject action with the FBI, he refused to answer, asserting the Fifth Amendment privilege.

4. Considering all of the evidence presented to the lower court and the surrounding circumstances, the answers sought by the questions asked could not possibly tend to incriminate Petitioner of some crime. The challenged questions merely sought information concerning the purchase of real estate and the furnishing of a bond to guaranty a loan with respect thereto, which subjects are the factual matter in issue in this civil lawsuit.

On eleven of the questions, and possibly two others, the Superior Court ruled that Petitioner had waived his right to the privilege by prior testimony of closely related factual information.

Past decisions of this court as well as state court decisions have made it clear that the privilege against self-incrimination may be waived with respect to inquiry into closely connected facts if the witness has voluntarily disclosed a portion of those facts. *Rogers v. United States, supra; Brown v. United States,* 356 U.S. 148 (1958); *Brown v. Walker,* 161 U.S. 591 (1896); *The Regents of the University of California v. Superior Court,* 200 Cal.App.2d 787 (1962); *People v. Freshour,* 55 Cal. 375 (1880).

Petitioner suggests as a rationale for upholding the privilege that the areas of actual testimony were not incriminating, while the areas in which the privilege was asserted may provide "a link in the chain of facts" tending to incriminate, and relies on subtle distinctions between the two areas. It is submitted that any question has the potential for seeking incriminating information, and the criteria for determination of waiver cannot be based on such suggested possibilities of incrimination, else the privilege becomes solely the province of the witness free from all judicial scrutiny.

It is obvious that after having reviewed the nature of the questions in the light of the testimony elicited from the Petitioner that the Superior Court found that Petitioner had waived his right to assert the privilege with respect to closely connected facts.

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Conclusion.

The lower court's ruling does not depart from any established legal principles nor conflict with any decisions of this Supreme Court or other federal courts. What the lower court decided, after considering all of the evidence and circumstances, was simply that Petitioner had failed to show that the information sought by the deposition questions might possibly have tended to incriminate him of some crime and, in some instances, that Petitioner had waived the privilege by prior testimony. The decision hardly presents such novel questions of law as to merit the consideration of the Supreme Court.

Accordingly, Respondent Houston respectfully requests that the subject Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX.

California Evidence Code Section 404.

§404. *Determination of whether proffered evidence is incriminatory.* Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege. (Stats. 1965, c. 299, §404.)